Public Prosecutor v Aziz bin Mat Shah

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–48 OF 2001
HELILIAH J
17 MARCH 2004

Criminal Law — Penal Code — s 300 — Murder — Question of lack of intention — Whether exist intention to commit murder — Whether blows were intentional and injury sufficient in ordinary course of nature to cause death — Penal Code s 302

Evidence — Witness — Credibility — Evidence of brothers — Whether brothers would not be truthful in incriminating their own brother

The accused was charged with the murder of a girl aged three years old, Nik Zarina bte Abdullah ('the deceased') under s 302 of the Penal Code. The evidences showed that the accused had came back from buying some food and subsequently started beating the child, because she was crying and did not want to eat when the accused tried to feed her. The accused slapped the child, then the accused covered her mouth using a pillow and punched the child on the chest many times. The issue was whether the blows inflicted by the accused were intentional and the probability of death was high and that the injury was sufficient in the ordinary course of nature to cause death.

Held, convicting the accused and imposing the mandatory death sentence:

(1) The accused did not deny that he had hit the deceased with his hand. What appeared in evidence was that he had a different version as to the degree and nature of the blows inflicted. Parts of his testimony also showed that he tried to shift some blame to the mother as a reason given by him as an excuse for getting angry with the deceased (see para 34).

(2) There was no reason to believe that the brothers would not be truthful in incriminating their own brother. The evidence of the brothers, were accepted for not only did the defence version fail to give any plausible reason except that he was irate, and had a momentary loss of control (see paras 34 and 37).

(3) Another submission advanced on behalf of the accused to negate that he had the intention to cause death was that if the child had received medical attention on time there would have been less certainty of death and accordingly the prosecution should not have preferred a charge incurring a death penalty. Based on the objective test, the court did not accept the submission that if the child had been brought on time, death was unlikely to occur (see paras 37–38).

(4) The question raised was the probability of the death. It was found that the blows inflicted by the accused were intentional and the probability of death was high for the testimony of the pathologist (SP7) was that the injury was sufficient in the ordinary course of nature to cause death (see para 39).

(5) At the end of the case for the defence, it was found that the prosecution had established its case beyond reasonable doubt in the context of the limb (c) of s 300 of the Penal Code (see para 40).

[**Bahasa Malaysia summary**

Tertuduh telah dituduh kerana membunuh seorang kanak-kanak perempuan berusia 3 tahun, bernama Nik Zarina bte Abdullah ('simati') di bawah s 302 Kanun Keseksaan. Bukti-bukti menunjukkan bahawa tertuduh telah pulang dari membeli sedikit makanan dan kemudiannya telah memukul kanak-kanak itu, kerana ia menangis dan enggan makan apabila tertuduh cuba untuk menyuapkannya. Tertuduh telah menampar kanak-kanak itu, dan kemudianya menutup mulutnya dengan sebiji bantal dan telah beberapa kali menumbuk dadanya. Isu di sini adalah sama ada pukulan-pukulan yang diakibatkan oleh tertuduh adalah disengajakan dan kebarangkalian kematian adalah tinggi dan bahawa kecederaan itu adalah memadai di dalam keadaan semulajadi yang biasa untuk menyebabkan kematian.

Diputuskan, mensabitkan kesalah tertuduh dan mengenakan hukuman mati mandatori:

(1) Tertuduh tidak menafikan bahawa beliau telah memukul si mati dengan tangannya. Apa yang kelihatan daripada bukti adalah tertuduh mempunyai berlainan versi terhadap tahap dan sifat pukulan-pukulan yang diakibatkan. Sebahagian daripada testimoninya telah menunjukkan bahawa beliau cuba untuk memindahkan sebahagian kesalahannya kepada ibu si mati sebagai alasan baginya untuk merasa marah terhadap si mati (lihat perenggan 34).

(2) Tidak ada sebarang alasan untuk mempercayai bahaya adik-beradik tidak mungkin bercakap benar untuk menunjukkan kesalahan saudaranya sendiri. Ketrangan adik-beradik tersebut diterima kerana bukan sahaja versi pihak pembela gagal untuk memberikan alasan yang munasabah kecuali bahawa beliau berang dan hilang pertimbangan seketika (lihat perenggan 34 dan 37).

(3) Penghujahan lain yang diajukan bagi pihak tertuduh untuk menafikan bahawa beliau mempunyai niat untuk menyebabkan kematian adalah sekiranya kanak-kanak itu telah menerima rawatan perubatan tepat pada masanya kepastian kematian adalah kurang dan justeru itu pihak pendakwa tidak seharusnya memilih dakwaan yang menyebabkan hukuman mati (lihat perenggan 37–38).

(4) Soalan yang ditimbulkan di sini adalah keberangkalian kematian. Adalah didapati bahawa pukulan-pukulan yang diakibatkan oleh tertuduh adalah disengajakan dan kebarangkalian kematian adalah tinggi berdasarkan testimoni ahli patologi (SP7) bahawa kecederaan tersebut adalah memadai di dalam keadaan semulajadi yang biasa untuk menyebabkan kematian (lihat perenggan 39).

(5) Di penghujung kes untuk pembelaan adalah didapati bahawa pihak pendakwa telah membuktikan kes mereka melampaui keraguaan yang munasabah dalam konteks cabang (c) s 300 Kanun Keseksaan (lihat perenggan 40).]

Notes

For cases on murder, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1129–1130.

For cases on witnesses, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2531–2559.

For murder generally, see 11 *Halsbury's Laws of Malaysia* paras [190.296]–[190.311].

For witnesses generally, see 12 *Halsbury's Laws of Malaysia* paras [210.137]–[210.176].

Cases referred to

Anda v State of Rajasthan AIR 1966 SC 148 (refd)
Jagrup Singh v State of Haryana AIR 1981 1552 (refd)
Jagtar Singh v State of Punjab AIR 1983 SC 463 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
PP v Halim bin Din [1999] 3 MLJ 433 (refd)
Sarabjeet Singh v State of UP AIR 1983 SC 529 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)

Legislations referred to

Evidence Act 1950 s 8
Penal Code ss 299, 300, limbs (b), (c), cll (a), (b), 302, 304

Abd Rahman Putra (Duncan Sekodal & Ahmad Akram bin Gharib with him) (Public Prosecutors) for the prosecution.
Nik Hashim bin Nik Daud (Nik Hashim & Assoc) for the accused.

Heliliah J:

THE CHARGE

Bahawa kamu di antara 1 Mei 2001 jam lebih kurang 10.00 malam sehingga 2 Mei 2001 jam lebih kurang 12.20 pagi, di bilik No 2028, Drop Inn Lodge City Centre, No 1 & 3, Jalan Tun HS Lee, di dalam Daerah Dang Wangi, Kuala Lumpur, di dalam Wilayah Persekutuan telah melakukan kesalahan membunuh, iaitu dengan niat menyebabkan kematian seorang kanak-kanak bernama: Nik Zarina bte Abdullah, No Sijil Kelahiran AG 90212, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

THE PROSECUTION'S CASE

[1] SP2 was the girlfriend of the accused. She had known him for about one year before the incident happened. SP2 had a daughter named Nik Zarina

bte Abdullah ('the deceased') whom she testified to be the daughter of her ex-husband, Encik Nik Hassan. The child lived with SP4 who was her grandmother because SP2 was working then, as a prostitute. One day, SP2 asked permission from SP4 to bring the child with her. SP2 took the child to live with her in Chow Kit. It was at that time that she first knew the accused.

[2] The accused took SP2 together with the child to his hometown in Terengganu to meet his parents. Later, the accused came back to Kuala Lumpur together with SP2, the child and his two younger brothers, SP5 and SP6. In Kuala Lumpur, they lived in a hotel near Puduraya Bus Station before they moved into Room 2028 of Hotel Drop Inn Lodge.

[3] On 1 of May 2001, SP2 went out to work (as a prostitute) that night, the exact time of which she could not remember. She left her child with the accused together with SP5 and SP6. When she left the room, she testified that her child was sleeping and was alright.

[4] SP5 and SP6 testified that both of them had come to Kuala Lumpur for the first time in the year 2001 and had been brought there by the accused himself. According to SP5, he was sleeping before he heard the sound of the child crying. SP6 had been watching television before the accused came back from buying some food and subsequently started beating the child, because she was crying and did not want to eat when the accused tried to feed her. Being a three year old child, she was also asking for her mother while crying.

[5] SP5 testified that on the night of the incident, he was sleeping when he heard the child crying. He then woke up and saw the accused beating the child. His testimony went on to say that the accused had first slapped the child, then the accused covered the child's mouth using a pillow and that the accused also punched the child on the chest many times.

[6] When questioned by the learned defence counsel during cross-examination, he gave evidence that the accused had first slapped the child's face on both sides for a few times. The accused had then held the child's shoulder and started punching the child on her chest. Later, the accused covered the child's face using a pillow. According to the prosecution, the cross-examination had in fact further strengthened the prosecution's case and that SP5 was not for one second shaken under cross-examination.

[7] SP6 in general gave the same version of evidence as what SP5 had testified. On the night of the incident, he was in the same room as the accused, SP5 and the child. The accused had just returned from buying some food for them. He tried to feed the child but this was refused by the child. Then, he started beating the child by slapping her. When asked how many times the accused slapped the child, SP6 answered 'Banyak kali'. SP6 further stated that after the slapping, the accused started punching the child on her chest and stomach. Then, the accused had used a pillow to cover the child's face before the deceased stopped crying.

[8] Under cross-examination, SP6 disagreed with learned defence counsel's suggestion that the accused had hit the child slowly. Instead, he stated that the accused hit the child hard. Again, according to the prosecution the cross-examination further strengthened the prosecution's case.

[9] SP8 who was the person in charge to take care of the operation of Hotel Drop Inn Lodge on the night of 1 May 2001 testified that he was sitting at the guest waiting lounge when the accused asked him to open the door of the hotel which was situated on the first floor of the building. Then, he saw the accused going back into Room 2028 and later came out holding the child in his arms. The accused told him to open the door because the child was sick and that he wanted to send her to the hospital. SP8 identified the child through photographs marked as exhs P3 A, B, C and D.

[10] The accused took the child to the Kuala Lumpur Hospital ('HKL'). On the way there, he dropped by at the place where SP2 was working that night. The accused told SP2 that the child was sick and that he was taking the child to the hospital.

[11] On the arrival at HKL, the accused met SP3 who was the medical officer on duty at the Emergency Department in HKL on 2 of May 2001 at about 1.55am. SP3 testified that when he received the child, she was not breathing and not showing any vital signs such as having blood pressure and pulse. SP3 applied respiratory treatment and gave the child oxygen and also conducted cardio-pulmonary resuscitation ('CPR') but to no avail. He failed to bring back the child to life and subsequently declared the child dead. SP3 then lodged a police report which was marked as exh P7 at HKL's police station.

[12] The accused then went back to meet SP2 and told her that the child had passed away. The accused together with SP2 then went to HKL to see the body of the child but they did not manage to do this. Both of them then returned to the hotel and the accused told SP8, 'Anak saya sudah meninggal'.

[13] The pathologist (SP7) who performed a post mortem on the body of the deceased, gave his opinion on the cause of her death. According to the post mortem report prepared by SP7 (exh P8), the cause of death was identified as 'Kecederaan dalam abdomen akibat blunt trauma'. SP7 in his testimony had said that the injury to the deceased's liver was most probably caused by a heavy blow to the abdomen part, a weapon which is hard and blunt in nature could have been used to cause this.

[14] According to the prosecution, the cause of death found by SP7 was therefore consistent with the testimony of SP5 and SP6 relating to the injury and what could have caused that injury. Both SP5 and SP6 testified that the accused punched the deceased on the chest and on the abdomen many times.

[15] The prosecution submitted on the elements to be proven under s 300 of the Penal Code. *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 1442 was cited as explaining that there are three elements which the prosecution must prove in order to establish that the accused is guilty of an offence under s 302 of the Penal Code. The elements are:

(1) that the death of a human being has actually taken place;

(2) that such death has been caused by, or in consequence of, the act of the accused;

(3) that such act was done with the intention of causing death; or it was done with the intention of causing such bodily injury as:

(a) the accused knew to be likely to cause death; or

(b) was sufficient in the ordinary course of nature to cause death; or the accused cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause:

(a) death, or

(b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

[16] SP5 in his examination in chief stated that he saw how the accused beat the deceased. In answer to a question by the prosecution he stated, 'Saya nampak macam mana Aziz pukul Nik Zarina. Dia tampar, dia tutup bantal di mulut, dia tumbuk-tumbuk atas dada, lepas itu dia pun letak Nik Zarina atas katil'.

[17] Under cross-examination, he stated, 'Aziz pukul sebab Zarina bising. Aziz pukul supaya nak suruh diam. Dia pukul dengan tangan. Tak tahu tangan yang mana satu sebab banyak dia pukul'. SP5 also said under cross-examination, 'Pada malam kejadian, mula-mula dia tampar muka belah kiri dan kanan. Kemudian dia pegang bahu dengan tangan kiri dan tangan kanan tumbuk dada. Lepas itu dia nak suruh Nik Zarina senyap, dia tutup muka dengan bantal'.

[18] SP6 testified that on the night of 1 May 2001, he was watching television when the deceased cried. Then he saw the accused hit the deceased before going out to buy dinner. When the accused came back, he tried to feed the deceased but the deceased refused. Then, the accused started beating the deceased. SP6 stated, 'Aziz tampar dan tumbuk bahagian perut dan dada. Selain itu, dia tutup dengan bantal kat muka. Dia tampar banyak kali dan dengan kuat. Dia pegang rambut dengan tangan kiri dan tumbuk dengan tangan kanan. Dia tumbuk banyak kali dengan kuat. Saya cuba suruh dia berhenti, dia tak berhenti. Dia terus memukul Nik Zarina'.

[19] The prosecution submitted that the deceased at the time of her death was only three years old while the accused was an adult male aged 22 years old. It was further submitted that the evidence of SP5 and SP6 showed that when beating the deceased, the accused used all his strength. He hit the deceased many times with forceful blows. This was consistent with the testimony of SP7 that the injury which contributed to the death of the deceased should have been caused by a very forceful blow.

[20] The Court of Appeal in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 is now off cited in its elucidation of what a prima facie case

is and reference is made to the relevant passages in the judgment of Gopal Sri Ram JCA as follows:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.
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> Support for the view we have expressed may be found in the case of *Murray v Director of Public Prosecutions* [1994] 1 WLR 1. That was a case of attempted murder and possession of a firearm with intent to endanger life which was tried before a judge *sitting alone.* Lord Slynn of Hadley there said (at p 11):
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> > 'The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so. Those consequences are not simply, as the defendant contends, that specific inferences may be drawn from specific facts. They include in a proper case the drawing of an inference that the accused is guilty of the events with which he is charged.
> >
> > This does not mean that the court can conclude simply because the accused does not give evidence that he is guilty. In the first place the prosecutor must establish a prima facie case — a case for him to answer. In the second place in determining whether the accused is guilty the judge or jury can draw only 'such inferences from the refusal as appear proper.' As Lord Diplock said in *Haw Tua Tau v Public Prosecutor* [1982] AC 136, at p 153:
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> > > "What inferences are proper to be drawn from an accused's refusal to give evidence depend upon the circumstances of the particular case, and is a question to be decided by applying ordinary common sense."
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> There must thus be some basis derived from the circumstances which justify the inference. If there is no prima facie case shown by the prosecution there is no case to answer. Equally, *if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify as inference of guilt*.
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> On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty. (Emphasis added.)
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> … … …
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> We have already expressed our view that neither s173(f) nor s 180 call for a minimal evaluation. In fact, they require quite the opposite. They call for a maximum evaluation of the prosecution's evidence.

In *Public Prosecutor v Data' Seri Anwar bin Ibrahim* (No. 3) [1999] 2 MLJ 1 at p 63, Augustine Paul J made the following observation which has since received approval *sub silentio* from the Federal Court (see [2002] 3 MLJ 193):

'A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.'

In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

[21] At the conclusion of the case for the prosecution, a submission was made on behalf of the accused that on the evidence led by the prosecution there was no evidence that he committed the offence as charged that is under s 300. In fact, counsel was urging upon the court to reduce the charge from s 300 to s 299. The main ingredient that was lacking according to the defence was mens rea. Section 8 of the Evidence Act 1950 was referred to as well as *Public Prosecutor v Halim bin Din* [1999] 3 MLJ 433. It would suffice to refer to the head notes. Although the facts there were such that a former inspector of police had fatally shot the deceased and was charged with murder but on appeal it was held that at the close of the prosecution's case the learned judge should not have called for the defence on the charge of murder as it was obvious that the most important ingredient of murder, ie mens rea was absent. It was held then that there was absolutely no evidence at all that the respondent intended to murder anyone as his sole intention was to avoid detection and capture. In that case on an appeal against acquittal, the appeal was allowed and the accused convicted under s 304 of the Penal Code. On the same basis counsel for the defence urged upon the Court that similarly the charge against Aziz Mat Shah should accordingly be amended to a charge where the offence would be punishable under s 304 of the Penal Code.

[22] It was noted however that at that stage it was not succinctly indicated under which limb of s 299 the charge should be amended to. It was also noted that the submission of the defence counsel was that the accused had exceeded his right that is 'mengajar budak dengan pukul'. The charge did not specify under which limb of s 300 of the Penal Code the prosecution was relying upon but the particulars are 'telah melakukan kesalahan membunuh iaitu dengan niat menyebabkan kematian seorang kanak-kanak'. In the submission of the prosecution reliance was placed on limb (b) of s 300, but it was contended that in addition to that the evidence adduced showed that limb (c) of s 300 of the Penal Code was applicable.

[23] The brunt of the prosecution's case was that the facts showed that from the way in which the injuries were inflicted as adduced by the evidence of SP5 and SP6, the accused when beating the deceased had used all his strength bearing in mind that at the time of her death the deceased was only three years old while the accused being an adult male was aged 22 years. The prosecution further relied on the evidence of SP6 that several blows were inflicted on the deceased and consistent with the testimony of SP7 the injury which had contributed to the death of the deceased should have been caused by a very forceful blow. It was contended that the blows were directed to the chest and abdomen and as such the blows inflicted were, inferentially, done with the intention to cause her death as the injuries were inflicted by heavy blows on the vital parts of the body of a three years old child.

[24] The prosecution also referred to a particular passage in the case of *Anda v State of Rajasthan* AIR 1966 SC 148 where it was held by Hidayatullah J, inter alia, at p 150:

> (5) Section 300 tells us when the offence is murder and when it is culpable homicide not amounting to murder. Section 300 begins by setting out the circumstances when culpable homicide turns into murder which is punishable under s 302 and the exceptions in the same section tell us when the offence is not murder but culpable homicide not amounting to murder punishable under s 304. Murder is an aggravated form of culpable homicide. The existence of one of four conditions turns culpable homicide into murder while the special exceptions reduce the offence of murder again to culpable homicide not amounting to murder. We are not concerned with the exceptions in this case and we need not refer to them. We now refer to the circumstances which turn culpable homicide into murder. They read:
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> '300 Murder
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> Except in the cases hereinafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
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> 2ndly, if it is done with the intention of causing such bodily injury as the offender known to be likely to cause the death of the person to whom the harm is caused, or
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> 3rdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
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> 4thly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
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> Taking the four clauses one by one we find that under the first clause of s 300 culpable homicide is murder when the act by which death is caused is done with the intention of causing death. This clause reproduces the first part of s 299. An intentional killing is always murder unless it comes within one of the special exceptions in s 300. If an exception applies, it is culpable homicide not amounting to murder. Itis the presence of a special exception in a given case which reduces the offence of murder to culpable homicide not amounting to murder when the act by which death is caused is done with the intention of causing death.

(6) The 2ndly in s 300 mentions one special circumstance which renders culpable homicide into murder. Putting aside the exceptions in s 300 which reduce the offence of murder to culpable homicide not amounting to murder, culpable homicide is again murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in his special case, provided the knowledge exists in relation to the particular person. If the element of knowledge be wanting the offence would not be murder but only culpable homicide not amounting to murder or even a lesser offence. Illustration (b) appended to this clause very clearly bring out the point. It reads:

> '(b) A knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury, Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.'

(7) The third clause views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the E intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not F amounting to murder or something less. The illustration appended to the clause 3rdly reads:

> '(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.'

The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder.

[25] A comparison could be made of cll (a) and (b) of s 300. Clause (b) is different from cl (a). In (b), the inference has to be that some peculiarity of the person harmed was intended to be also within the knowledge of the accused. In (c), the person to whom the harm is caused is not spoken off at all. On the basis of the evidence of SP5 and SP6, the injuries were inflicted by the blows which were repeated and included the blows on the abdomen. The accused in his own statement showed that he conceded that the blows were intended Objectively, there was bodily injury present and the testimony

of SP7 indicated that the injury was sufficient in the ordinary cause of nature to cause death. At the end of the prosecution's case, it was found that a prima facie case was established and the accused was directed to enter his defence.

(1) It was noted that generally, the defence had conceded that death had actually occurred on a child name Nik Zarina bte Nik Abdullah (the deceased) and that the death was caused by the act(s) of the accused himself. The defence asserted however was that the accused did so without the *intention* to murder the child and without the *knowledge* that his acts could have resulted in the death of the child.

(2) Under cross-examination, the accused stated that he knew that ever parts of the body are vital. He agreed that there was a distinction between a three years old child and a 23 years old adult. He had also conceded that no matter how an adult gets angry at a child, the most he can do is to cane the child. He admitted that it is cruel to punch a three years old child on the chest.

[26] The defence relied primarily on the question of the lack of intention or even the absence of premeditation. Three cases cited by the learned counsel for the accused need to be mentioned. The first is *Jagtar Singh v State of Punjab* AIR 1983 SC 463. The nature of the offence and sentence was discussed.

> 6 A quarrel took place on the spur of the moment. The appellant never expected to meet the deceased. When the deceased was just passing by the road in front of the house of the appellant, his forehead dashed with the parnala of the house of the appellant which provoked the deceased to remonstrate the appellant. It is in evidence that there was exchange of abuses and at that time appellant gave a blow with a knife which landed on the chest of the deceased.
>
> 7 Undoubtedly, PW2 Dr HS Gill opined that the blow on the chest pierced deep inside the chest cavity resulting in the injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. *The question is whether in the circumstances in which the appellant gave a blow with a knife on the chest he could be said to have intended to cause death or he could be imputed the intention to cause that a particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation.* It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of s 300 is attracted. We considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. *There was no premeditation. There was no malice*. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of s 300 would be attracted. We are fortified in this view by the decision of this Court in *Jagrup Singh v State of Haryana* (1981) 3 SCC 616: (AIR 1981 SC 1552). It was subsequently followed in *Randhir Singh v State of Punjab* decided on 18 September 1981: (reported in AIR 1982 SC 126)). *Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under s 302 IPC and sentence of imprisonment for life are liable to be set aside.*

8 *The next question is what offence the appellant is shown to have committed?* In a trivial quarrel the appellant wielded a weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. *In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death.* Therefore, the appellant is shown to have committed an offence under s 304. Part II of the LPC and a sentence of imprisonment for five years will meet the ends of justice.

[27] In *Jagrup Singh v State of Haryana* AIR 1981 1552. The head notes indicated that the accused struck the deceased with the blunt side of gandhala in the heat of a moment without premeditation and in a sudden fight. This however was a solitary blow and where the appellant acted in the heat of a moment and the circumstances were such the case was brought with exception 4 of s 300 of the Penal Code.

"Looking at the totality of the evidence in the instant case it would not be possible to come to the conclusion that when the accused struck the deceased with the blunt side of the gandhala, he intended to cause such bodily injury as was sufficient in the ordinary course of nature to cause death. If a man is hit with the blunt side on the head with sufficient force, it is bound to cause death. There can be no doubt that it was used with certain amount of force because there was cerebral compression. But that by itself is not sufficient to raise an inference that the accused intended to cause such bodily injury as was sufficient to cause death. He could only be attributed with the knowledge that it was likely to cause an injury which was likely to cause the death. The matter, therefore, does not fall within clause Thirdly of Sec 300 of the Code.

[28] The third case is *Sarabjeet Singh v State of U.P* AIR 1983 SC 529. This is a case where a child of about four years was thrown to the ground. The headnotes state:

Every death cannot be viewed backward so as to charge the one who caused death as a murderer. Such an approach would remove the well recognized line between culpable homicide amounting to murder and culpable homicide not amounting to murder. Primarily in any action taken by the criminal, his state of mind is very relevant. The state of mind may either disclose intention or knowledge and that is a very relevant factor. It is equally true that these are a bit illusory factors to be deduced from surrounding circumstances such as the genesis of the occurrence, the motive, the weapon used, the seat of injury, the ferocity of the attack, etc. It is also equally true that every grown up man is presumed to know the natural and probable consequence of his own act.

In the instant case the deceased a child of about four years met homicidal death. The accused had enmity with the father of the deceased child. The accused along with several other persons had attacked the members of the child's family and had sought to demolish the hut of the child's father. During the occurrence the accused lifted the child and threw him on the ground The child suffered brain injury and died.

[29] The Court in discussing the act of throwing the boy stated at para 14:

> 14 Now, obviously the first part of s 300 will not be attracted because it could not be said that the act of accused 1 which caused the death was done with the intention of causing death. Accused 1 had no grievance against an innocent child.

[30] *Jagrup Singh*'s case had the occasion to refer to the ingredients of the third clause of s 300 as follows:

> 7 The ingredients of Clause Thirdly of s 300 of the Code were brought out by Vivian Bose J in *Virsa Singh v State of Punjab* 1958 SCR 1495 at p 1503: (AIR 1958 SC 465 at p 467) in his terse language:
>
> 'To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300, "3rdly."
>
> First, it must establish, quite objectively, that a bodily injury is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.'

The learned judge explained the third ingredient in the following words (at p 468).

> The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence of the circumstances warrant an opposite conclusion.

[31] *Sarkar on Evidence* (25th Ed) at p 1290 states:

> In the scheme of the Penal Code 'culpable homicide' is genus and 'murder' is specie. All murders are culpable homicides but not vice versa Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is what may be called 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in s 300 as 'murder'. The second

may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of s 304. Then there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest amongst the punishments provided for the three grades. In the leading case *State v Rayavarapu Punnayya,* speaking for the Supreme Court, Sarkaria J, stated:

> 'It emerges (from the scheme) that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such a causal connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, Penal Code is reached. This is the stage at which the court should determine whether the facts proved by the prosecution brings the case within the ambit of any of the four clauses of the definition of "murder" contained in section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of section 304, depending, respectively, on whether the second or the third clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in section 300, the offence would still be "culpable homicide not E amounting to murder", punishable under the first part of section 304, Penal Code.'

[32] *Sarkar* further mentioned the case of *Rajwant Singh* AIR F 1966 SC 1874:

> In *Rajwant Singh*, the Supreme Court stated: 'The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.'

Explaining clause 3 of section 300, Vivian Bose J, in the leading case of *Virsa Singh* observed:

> 'To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 "thirdly";
>
> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; these are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.'

[33] It had been submitted on behalf of the accused that on the authority of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 the case would fall within s 299 of the Penal Code if the act is only likely to cause death for in view of the medical evidence in the present case the case might therefore not unreasonably have fallen with the lesser offence of culpable homicide not amounting to murder punishable within the second part of s 304 of the Penal Code. It was noted however in *Tham Kai Yau's* case, by the learned judge Raja Azlan FJ (as he then was) that the medical witness should have been asked for his opinion on the nature of injuries in that case and its likely and natural effects on the deceased. Apparently in the words of the learned judge the evidence was 'silent'. In this case, Dr Mohd Shah bin Mahmood had tendered his report which contained inter alia the following:

'sebab kematian':

'la kecederaan dalam abdomen akibat blunt trauma'

In his oral testimony the witness explained, inter alia:

Report referred to:

Q: How injury to liver could have happened?

A: Kecederaan ke bahagian hati kemungkinan besar disebabkan oleh pukulan yang kuat di bahagian abdomen.

Q: Maksud 'pukulan kuat'?

A: Pukulan alat yang keras dan tumpul, eg tumbukan, tendangan atau alat yang keras dan tumpul seperti kayu.

Q: Could an ordinary blow cause this injuiy?

A: Kemungkinan boleh.

Q: How would a child react to this kind of circumstances?

A: Biasanya menangis.

Q: Did you note any natural disease which could contribute to death of decease?

A: Tidak ada yang jelas kelihatan.

Q: How long are these injuries?

A: 3cm tear.

Q: Can it cause death?

A: Boleh.

Q: How long before that were injuries caused (opinion).

A: Anggaran antara 3–6 hours berdasarkan masa pendarahan dari luka koyak di bahagian hati. Pada andaian si mati dibawa mati pada lebih kurang jam 1.30 pagi ke a/E Hospital KL.

In short 3–6 hours before being brought to Hospital by which time deceased was dead.

Dari laporan, cause of death kecederaan dalam abdomen.

Q: Bleeding in head. Could have died if not treated?

A: Boleh.

Report tendered to be marked as exhibit.

Cross-examination

Laporan bedah siasat prepared and signed by me.

Kecederaan dalam abdomen akibat blunt truma – jelaskan.

Blunt – benda tumpul (not sharp) yang termasuk weapon. Tangan boleh juga.

Q: Kematian si mati disebabkan satu sebab.

A: la luka dalam hati.

Q: External injuries 1–11 boleh menyebabkan kematian?

A: Tidak cukup untuk menyebabkan kematian.

Hypothesis:

Eg Mike Tyson boleh menyebabkan kematian on adult.

A: Jika tidak mendapat rawatan pembedahan segera boleh menyebabkan kematian.

Q: Dalam pemeriksaan ada 'old injury' and 'new injury' tak menyebabkan kematian?

A: la.

Q: Tangan boleh jadi weapon?

A: la.

Q: Polis ada tunjuk exhibit apa-apa?

A: Tiada.

Q: Jika ada weapon boleh assist membuat laporan?

A: Kalau ada boleh membantu.

Q: Injury pada liver jika diberi treatment.

A: Boleh diselamat

Q: Rawatan melalui surgery?

A: Yes.

Saya serahkan perkara si mati kepada penyiasat.

Q: Kesemua injury ini boleh tak ketahui siapa yang boleh membuatnya? Boleh tak tentukan position victim, eg baring ke, berdiri ke, tak dapat menetapkan dari tanda kesan-kesan.

For these injuries, any possibility that these injuries could have been caused just by hand?

A: Boleh.

Re-examination:

… … … … … … …

Q: Cause of death?

A: Kecederaan dalam abdomen akibat blunt truma.

Q: Could the injury to the head cause death?

A: Dalam kes ini boleh juga. More fatal in abdomen. Cause of death: in abdomen. Pada subjective assessment injury itu disebabkan force yang kuat.

[34] The accused did not deny that he had hit the deceased with his hand. What appeared in evidence was that he had a different version as to the degree and nature of the blows inflicted. The accused also gave a version which amounted to a denial that there were two stages in which the child was hit by him namely before he went out to buy the food when the child was whining and at another stage when the child fretfully declined the food that the accused attempted to make her consume. The evidence of the brothers, Alias and Adika were accepted for not only did the defence version fail to give any plausible reason except that he was irate, and had a momentary loss of control. The accused also attempted to refute that the mother of the child (PW2) was a prostitute but parts of his testimony also showed that he tried to shift some blame to the mother as a reason given by him as an excuse for getting angry with the deceased.

[35] Having regard to the medical evidence, the following were the parts of the evidence taken into account namely that of SP5 and SP6:

ALIAS – SP5

Saya tidur. Saya bangun bila dengar Zarina menangis. Saya melihat Zarina dipukul Aziz.

Dia tampar, dia tutup mulut dengan bantal dan tumbuk dada, letak Zarina atas katil. Zarina terus minta air.

Aziz bagi air.

Zarina kata ia hendak tidur – kemudian nampak Zarina tak bergerak.

Aziz bawa Zarina ke hospital.

… … … … … … …

Semasa Zarina dipukul dia menangis tak berapa kuat.

Bantal ditutup bahagian muka, dia tumbuk dada.

Saya tak menyoal dia kerana tak berani, takut dia pukul saya.

Masa Aziz pukul Zarina dia suruh Zarina diam.

Semasa menyuruh Zarina diam, Zarina dipukul.

Adika juga dalam bilik, Adika cuba cakap tetapi dia takut.

… … … … … … … … … …

Bila Zarina menangis Aziz pukul – supaya ia tidak menangis.

Aziz pukul dengan tangan. Tak tahu mana tangan kerana banyak kali dipukul.

Dipukul di tepi katil, atas katil (iaitu yang saya melihat).

… … … … … … … … …

Pada malam yang berkenaan Aziz mula-mula tampar dengan tangan.

'Demonstrate' (hitting left side with right hand). Dia pegang bahu kiri dan tumbuk dengan tangan kanan.

Dia suruh Zarina senyap. Dia ambil bantal dan cekup bantal ke muka Zarina sehingga budak itu tidak berupaya.

Masa tampar dan tumbuk Zarina berdiri. Masa Zarina tak berdaya dia baring dan Aziz tutup muka dengan bantal. Zarina mengelupur.

Lepas itu ia minta air.

Zarina ada menyebut dia lapar – Aziz masuk. Zarina nampak Aziz dia macam takut dan kemudian menangis dan Aziz pukul dia.

Bantal ialah dari bilik hotel.

Tak setuju cadangan peguam bahawa Zarina kata dia lapar, kemudian menangis dan Aziz pukul.

Bila muka ditutup, Aziz melepaskan bantal apabila dia nampak kanak-kanak itu tidak lagi bising.

Sebelum Aziz tampar ia ada keluar dan masuk balik.

Sekembalinyalah berlaku insiden yang disebutkan itu.

Dia keluar dalam 1/2 jam. Tak setuju dengan cadangan Aziz masuk oleh kerana Zarina menangis.

Apabila Zarina minta air, Aziz ambil air yang ada dalam bilik.

Selepas minum Zarina kata nak tidur. Sebelum dia tidur saya cakap pada Aziz bawa dia ke Hospital sebab saya nampak dia tidak berupaya.

Semasa Aziz menampar dan memukul Zarina dia ada menyuruh Zarina 'diam'.

… … … … … … … … …

Dia bawa balik makanan untuk Adika dan Alias dan cuba beri Zarina makan tetapi Zarina tak mahu.

Zarina tak makan tetapi dia bergolek ke sana sini. Aziz cuba suap dia tidak hendak.

Kemudiah berlakulah insiden yang dikatakan.

Perut Zarina juga ditekan.

Masa minta air, dia belum pengsan tetapi tak berupaya.

Dia minum.

Yang saya tahu dia suruh Zarina diam. Semasa pukul ia kata 'diam, diam'. Dia tidak berkata apa-apa lain.

[36] The part of evidence of SP6 considered material to the question of intention is as follows:

ADIKA – SP6

A: Saya dalam bilik, Aziz dan Alias ada dan Zarina. Zaleha tiada.

Pada masa itu saya menonton TV, Zarina menangis. Aziz pukul.

Aziz keluar beli makanan. Dia tampar berkali-kali.

Aziz pergi seorang membeli makanan. Dia balik dia cuba beri makanan kepada Zarina tetapi beliau tak mahu. Lepas itu Aziz terus pukul. Dia tampar dan tumbuk bahagian perut dan dada. Dia tutup muka dengan bantal. Dia tampar banyak kali dengan kuat. Dia pegang rambut dengan tangan kiri dan tumbuk dengan tangan kanan banyak kali. Dia tumbuk dengan kuat.

Saya cuba suruh dia berhenti. Dia tak berhenti. Dia terus menumbuk Zarina.

Tak ingat berapa lama dia letak bantal di muka.

Sebelum diletak bantal di muka Zarina, Zarina masih menangis.

Setelah letak bantal ia berhenti menangis. Zarina masa itu baring di atas katil.

Ketika ditumbuk Zarina atas katil.

Zarina tak boleh bemafas. Zarina minta air. Saya beri dia minum air.

Lepas itu Zarina kata 'nak tidur'. Lepas itu dia pengsan.

… … … … … … … … … …

Jarak dia melihat Aziz pukul Zarina di hujung kaki lebih kurang – 2 metre. Saya nampak kanak-kanak dipukul tak terlindung (sideways).

Saya suruh dia berhenti.

'Sudahlah tu berhenti'.

Ada 2 kali – dia terus pukul.

Sebelum dipukul Zarina menangis. Dia cakap dia hendak Zaleha.

Aziz suruh dia diam. Banyak kali juga.

Bila Zarina tak diam, dia bangun dan pukul Zarina untuk suruh diam.

Zarina menangis dan lepas itu diam. Lama dia menangis. Tak ingat berapa lama.

Arwah kata 'nak air'.

Saya beri dia, dia cakap nak tidur.

Sebelum turun dia ada pukul untuk suruh diam. Aziz keluar beli makanan.

Zarina tak mahu makan. Dia cakap 'nak Mak'.

Aziz jawab Mak pergi kerja.

Dia sudah menangis. Aziz suruh Zarina diam, Semasa itu dia pukul.

Cadangan:

Q: Aziz pukul nak suruh Zarina diam?

A: Tak setuju.

Tak setuju Aziz tak kuat pukul.

[37] While SP5 and SP6 are brothers of the accused there was no reason to believe that the brothers would not be truthful in incriminating their own brother. Another submission advanced on behalf of the accused to negate that he had the intention to cause death was that if the child had received medical attention on time there would have been less certainty of death and accordingly the prosecution should not have preferred a charge incurring a death penalty.

[38] From the evidence however Adika had stated that the deceased fell back on the bed, woke up and requested for water and it was only upon the urgings of Adika that the accused made the attempt to take the child to hospital. Based on the objective test the Court did not accept the submission that if the child had been brought on time death was unlikely to occur.

[39] The question raised here is the probability of the death. It is found that the blows inflicted by the accused were intentional and the probability of death was high for the testimony of SP7 was that the injury was sufficient in the ordinary course of nature to cause death.

[40] At the end of the case for the defence it was found that the prosecution had established its case beyond reasonable doubt in the context of the limb (c) of s 300 of the Penal Code.

[41] It was therefore held that the accused was guilty as charged and the mandatory death sentence imposed.

Accused convicted and sentenced to death.

Reported by Mohd Nizam Hamdan